No. 78-1651

In the Supreme Court of the United States

OCTOBER TERM, 1979

SEATRAIN SHIPBUILDING CORPORATION, ET AL.,
PETITIONERS

v.

SHELL OIL COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL PARTIES

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1. The primary issue in this case is whether the Secretary of Commerce may relieve a vessel that has received a construction-differential subsidy pursuant to Title V of the Merchant Marine Act, 1936, 46 U.S.C. 1151 *et seq.*, of the trade restrictions imposed by Section 506 of the Act, 46 U.S.C. 1156, in return for repayment in full of the subsidy.[1] Contrary to plaintiffs' contentions, nothing in the language or legislative history of Section 506

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[1]The statement of facts contained in the Brief For The Respondents Alaska Bulk Carriers, Inc. and Trinidad Corporation ("Alaska Bulk") is, to say the least, misleading. Alaska Bulk attempts to suggest that the lower court proceedings established that the transaction at issue in this case is merely the latest step in an ongoing course of misconduct by the Secretary to favor petitioners (Br. 7-15). Alaska Bulk made these same allegations in its original complaint, but rather than attempt to prove them at a trial, Alaska Bulk voluntarily dismissed that portion of its complaint (A. 558).

suggests that the Secretary is powerless to accept repayment of a subsidy in exchange for a release from Section 506 restrictions.[2] Rather, Sections 207, 501 and 504 of the Act, 46 U.S.C. 1117, 1151 and 1154, and the legislative history of the statute, including Congress' express approval of the administrative interpretation at issue in this case, make clear that Congress intended to permit the Secretary to rescind a construction-differential subsidy contract in appropriate circumstances. Plaintiffs' failure to refute this proposition is discussed in detail in petitioners' reply brief, upon which we rely.[3]

2. As we pointed out in our opening brief, this issue of statutory power is not properly before the Court, because the court of appeals lacked jurisdiction to hear this case. The district court order from which plaintiffs appealed was merely a remand order, directing the Secretary to consider expeditiously one of plaintiffs' alternative theories for relief. That order did not constitute a final decision within the purview of 28 U.S.C. 1291, and it did not conclusively determine any separate claim for relief. See Fed. R. Civ. P. 54(b); 28 U.S.C. 1292(a)(1).

Plaintiffs offer several arguments in an attempt to avoid the general rule that "under normal circumstances a remand to an [executive department] for futher proceedings is not a final judgment within the meaning of 28 U.S.C. § 1291." *Ringsby Truck Lines, Inc.* v. *United States*, 490 F. 2d 620, 624 (10th Cir. 1973). Plaintiffs contend that the district court's November 30 order finally determined their separate "claim for relief" regarding the Secretary's power and that, even if the Secretary on remand concluded that she would not approve the STUYVESANT transaction, plaintiffs could have prosecuted an appeal on the abstract legal question of the Secretary's power. Therefore, the argument runs, the district court properly certified the question of statutory interpretation for an immediate appeal pursuant to Rule 54(b), which provides that "the court may direct the entry of a final judgment as to one or more but fewer than all of the claims * * *" (see Alaska Bulk Br. 27-36; Shell Oil Br. 75-83). Alternatively, plaintiffs claim that the November 30 order finally determined their claim for injunctive relief and was accordingly appealable under 28 U.S.C. 1292(a)(1) (see Alaska Bulk Br. 43-46; Shell Oil Br. 83-86). These contentions are without merit.

The premise of plaintiffs' argument is that the abstract question of the Secretary's power under the Act is an independently viable "claim" separate and apart from the concrete question of whether the Secretary may authorize the STUYVESANT to sail in the Alaskan trade. But the case or controversy requirement of Article III precludes the federal courts from rendering advisory opinions on abstract or hypothetical questions. See, *e.g.*, *Golden* v. *Zwickler*, 394 U.S. 103, 110 (1969); *United Public Workers* v. *Mitchell*, 330 U.S. 75, 89 (1947); *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 240-241 (1937). If the Secretary had not authorized the STUYVESANT transaction in the first instance, for reasons related to competitive injury rather than her statutory authority, plaintiffs plainly could not have

[2]A ship that has repaid the subsidy in full and therefore no longer enjoys the benefits of that subsidy is simply not "a vessel for which a construction-differential subsidy has been paid" within the meaning of Section 506, 46 U.S.C. 1156.

[3]We briefly respond to Alaska Bulk's claim that the government's citation (Govt. Br. 64 n.67) to two congressional reports relating to the 1970 amendment of the Act is "puzzling" (Br. 78). The cited reports reflect with clarity Congress' understanding that the Secretary has broad powers under Section 207 of the Act, 46 U.S.C. 1117, to settle and amend subsidy contracts. See H.R. Conf. Rep. No. 91-1555, 91st Cong., 2d Sess. 7 (1970); S. Rep. No. 91-1080, 91st Cong., 2d Sess. 63 (1970).

alleged a concrete injury in fact sufficient to allow them to invoke the jurisdiction of the federal courts to determine the Secretary's putative powers under the Act. See, *e.g.*, *O'Shea* v. *Littleton*, 414 U.S. 488, 493-498 (1974); *Laird* v. *Tatum*, 408 U.S. 1, 11-15 (1972); *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158 (1967); *ILU, Local 37* v. *Boyd*, 347 U.S. 222 (1954); *United Public Workers* v. *Mitchell, supra*, 330 U.S. at 86-91.[4] Similarly, if the Secretary on remand had concluded that she would not go forward with the STUYVESANT transaction, there would no longer have been a live case or controversy, and plaintiffs could not have appealed the merits of the district court's determination of the statutory issue, particularly since the Secretary has exercised this power so infrequently. See, *e.g.*, *Golden* v. *Zwickler, supra*; *Mechling Barge Lines* v. *United States*,

[4]Alaska Bulk's reliance (Br. 33-34) on *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), is misplaced. In that case, the administrative agency had directed the various plaintiffs to change their drug labels. That order constituted a concrete controversy satisfying the requirement of Article III. Where, however, an agency has at most only asserted its power to act in a particular circumstance but is not about to act, has not yet acted or, after consideration, has declined to act, there is no ripe controversy. For example, in *Toilet Goods Ass'n* v. *Gardner, supra* (decided the same day as *Abbott Laboratories*), the Court declined to adjudicate the statutory question of the FDA's power of inspection in the absence of an attempt to inspect. So too here, there is no ripe controversy in the absence of a particular determination by the Secretary to accept repayment of a specific vessel's contruction-differential subsidy.

The decision in *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), further demonstrates this point. In that case, the Court concluded that it was constitutionally permissible to address the constitutionality of the statute at issue only because the plaintiffs were in fact suffering injury as the result of the operation of the nuclear power plants. *Id.* at 72-82. Here, the question of the construction of the Act only arises if the Secretary authorizes a once-subsidized ship to repay its entire subsidy and thereafter to operate in the Alaskan trade.

368 U.S. 324, 328-330 (1961); *California* v. *San Pablo & Tulare R.R.*, 149 U.S. 308 (1893). Cf. *Poe* v. *Ullman*, 367 U.S. 497 (1961).[5]

It is thus apparent that plaintiffs have alleged no independent "claim" regarding the Secretary's statutory power. Rather, plaintiffs have asserted two interrelated theories in support of their single claim. The district court's November 30 order did not finally determine this claim; accordingly, the court's Rule 54(b) certification was incapable of creating appellate jurisdiction. See, *e.g.*, *Schexnaydre* v. *Travelers Insurance Co.*, 527 F. 2d 855 (5th Cir. 1976); *McNellis* v. *Merchants National Bank and Trust Co.*, 385 F. 2d 916 (2d Cir. 1967); *Baca Land and Cattle Co.* v. *New Mexico Timber, Inc.*, 384 F. 2d 701 (10th Cir. 1967); 10 C. Wright & A. Miller, *Federal Practice and Procedure* § 2656, at 41 & § 2657, at 53 (1973); 6 *Moore's Federal Practice* para. 54.27[3], at 332-334 (2d ed. 1976). Likewise, the November 30 order did not conclusively adjudicate plaintiffs' claim for injunctive

[5]Shell Oil erroneously claims that a case or controversy would continue to exist in any event, because it would be collaterally estopped from relitigating this statutory question if the Secretary in the future were to approve a STUYVESANT-type transaction (Br. 76-79). Assuming that the Secretary declined to allow the STUYVESANT to engage in the Alaskan trade, collateral estoppel would not preclude plaintiffs from raising anew the issue of the Secretary's power if in the future the Secretary had again entered into a STUYVESANT-type transaction. The Court has made clear "that a party should not be concluded in subsequent litigation by a District Court's resolution of issues, when appellate review of the judgment incorporating that resolution, otherwise available as of right, fails because of intervening mootness." *Mechling Barge Lines* v. *United States, supra*, 368 U.S. at 329; see *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). In fact, if the Secretary had mooted this case on remand, plaintiffs could have avoided even the *stare decisis* effects of the district court's decision by requesting the court to vacate its decision, and, if the district court's refused, by appealing the refusal to vacate. See *id.* at 39-40.

relief. See, *e.g.*, *Cromaglass Corp.* v. *Ferm*, 500 F. 2d 601, 605-609 (3d Cir. 1974) (en banc); *United States* v. *Crow, Pope and Land Enterprises, Inc.*, 474 F. 2d 200 (5th Cir. 1973); *Western Geophysical Co.* v. *Bolt Associates, Inc.*, 440 F. 2d 765 (2d Cir. 1971); 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3924, at 80-81 (1977).[6]

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be vacated and remanded with instructions to dismiss plaintiffs' appeal for lack of jurisdiction. If the Court reaches the merits, the judgment of the court of appeals should be reversed.

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[6]The lack of finality of the district court's order is further evidenced by Alaska Bulk's claims (Br. 107-113) regarding the nature of the subsidy repayment—an issue considered in detail by the Secretary in the course of the remand proceedings (A. 589-596). Because of plaintiffs' premature appeal, neither lower court has had an opportunity to consider this issue.

DOJ-1979-11